

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Cochise Media Licenses LLC)	
)	
Station KXMK(FM), Oatman, AZ)	File No. BLSTA-20160222ABV
)	Facility ID No. 183358

ORDER

Adopted: May 25, 2017

Released: May 26, 2017

By the Chief, Media Bureau:

I. INTRODUCTION

1. We have before us the captioned application for special temporary authority and related pleadings.¹ In this Order, we adopt the attached Consent Decree entered into by the Media Bureau (Bureau) and Cochise. The Consent Decree resolves issues related to a chronic failure to serve the public interest by Cochise Media Licenses LLC (Cochise), the licensee of KXMK(FM), Oatman, Arizona, by requiring Cochise to donate the station's license and related equipment to a nonprofit organization or surrender the license for cancellation.

II. BACKGROUND

2. A "silent station" is a radio or television station that is authorized to broadcast but is not doing so. Any station that remains silent for more than 30 days must obtain special temporary authority (STA) to remain silent.²

3. Section 312(g) of the Communications Act of 1934, as amended (Act), provides in relevant part:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial

¹ See "Informal Objection and Request to Order KXMK License As Expired or to Revoke KXMK License," Big River Broadcasting, LLC (filed Mar. 14, 2016, and attaching prior pleadings consisting of "Notification of Expiration of License," "Response to 'Notification of Expiration of License,'" and "Reply to Response to Notification of Expiration of License"); see also "Opposition to Informal Objection and Request for Prompt Action," Cochise Media Licenses LLC (filed May 18, 2016).

² See 47 CFR § 73.1740(a)(4). Similarly, a station that is operating with reduced power for more than 30 days must obtain an STA to do so. See 47 CFR § 73.1560(c).

appeal, the applicable law changes, or for any other reason to promote equity and fairness.³

4. Section 312(g) has relieved the Commission from the need to conduct revocation proceedings, with their lengthy procedural requirements, including evidentiary hearings, for stations that remain silent for extended periods of time.⁴ However, in response to Section 312(g), some licensees of silent stations have adopted a practice of resuming operation for a short period of time, in some cases as little as a day, before the one-year limit in Section 312(g) applies.

5. In this case, Cochise claimed to have avoided license expiration for KXMK under Section 312(g) by resuming operation for approximately one day, beginning on the afternoon of January 23, 2015. An objector presented a contrary showing that raised questions as to whether KXMK had resumed operation on that day, and if so, whether it did so with authorized facilities.⁵

6. A Bureau investigation into the Section 312(g) issue would be costly and time-consuming, with no guarantee of a definitive factual resolution. Regardless of the outcome, such an investigation would not solve the underlying issue, which is KXMK's chronic failure to operate. Our records indicate that since being licensed on January 23, 2014, KXMK has, by Cochise's own admission, operated only three days at the most. In order to resolve this proceeding in a manner that will promote service to the public in an underserved area, Cochise and the Bureau have entered into the attached Consent Decree.

III. DISCUSSION

7. KXMK is licensed to provide radio service to an underserved area, but the station's public service record is essentially non-existent. Any investigation into the Section 312(g) issue would not solve that problem. Rather than expend time and scarce resources in such an investigation, Cochise and the Bureau have reached a settlement in which Cochise will donate KXMK's license and transmission equipment to a non-profit organization that wishes to operate the station. In the event Cochise and the Bureau are not able to promptly find such an organization to accept those assets, the KXMK license will be cancelled, which may enable other stations to upgrade or move their facilities to better serve the public.

8. If Cochise cannot find a donee for the station, the Bureau intends to notify potentially interested Tribal Nations of the opportunity to acquire the KXMK license and related assets. The Bureau will cooperate with other offices in the Commission, particularly the Office of Native Affairs and Policy, to provide such notice. For purposes of expediting the initiation of vital radio services for the benefit of Tribal Nations, the Bureau will consider a waiver of the Commission's FM minor modification rule⁶ to enable a donation of the station to an entity that would qualify for a Tribal Priority, for service at a location that would satisfy Tribal Priority requirements.⁷

³ 47 U.S.C. § 312(g); *see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and Consolidated Appropriations Act, 1995, Pub. L. No. 108-447, 118 Stat. 2809 (2004); *see also* *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009) (*Eagle*).

⁴ *See Eagle*, 563 F.3d at 545.

⁵ *Id.*

⁶ *See* 47 CFR §73.3573(a)(1) and (b)(1).

⁷ *Id.* at Note 5.

9. IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended,⁸ and by the authority delegated by Sections 0.61 and 0.283 of the Commission's rules,⁹ the Consent Decree attached hereto IS ADOPTED.

10. IT IS FURTHER ORDERED that copies of this Order shall be sent by First Class and Certified Mail, Return Receipt Requested, to Cochise Media Licenses LLC and its counsel, Susan A. Marshall, Esq., Fletcher, Heald & Hildreth, 1300 N. 17th St., 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief
Media Bureau

⁸ 47 U.S.C. §§ 154(i).

⁹ 47 CFR §§ 0.61, 0.283.

CONSENT DECREE**I. INTRODUCTION**

1. This Consent Decree is entered into by and among the Bureau and Licensee, by their respective authorized representatives, and the Owners for the purpose of resolving certain issues related to pending applications filed by the Licensees.

II. DEFINITIONS

2. For the purposes of this Consent Decree, the following definitions shall apply:
- (a) "Act" means the Communications Act of 1934, as amended.¹
 - (b) "Bureau" means the Media Bureau of the Federal Communications Commission.
 - (c) "Commission" or "FCC" means the Federal Communications Commission.
 - (d) "Communications Laws" means, collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which each Commission licensee is subject by virtue of its being a Commission licensee.
 - (e) "Effective Date" means the date on which the Bureau releases the Order.
 - (f) "Execution Date" means the date on which this Consent Decree is executed by the last of the Parties to do so.
 - (g) "KXMK" means the following FM broadcast station, identified by call sign and Facility ID Number: KXMK (183358).
 - (h) "Licensee" means Cochise Media Licenses LLC.
 - (i) "Order" means the Order of the Bureau adopting this Consent Decree.
 - (j) "Owners" means Ted Tucker and Jana Tucker, each of whom is an "Owner."
 - (k) "Parties" means each of the Licensee, each of the Owners, and the Bureau, each of which is a "Party."
 - (l) "Property Schedule" means the attached inventory of equipment for KXMK that Licensee has agreed to donate to a nonprofit organization that is approved by the Bureau as assignee of KXMK.
 - (m) "Rules" means the Commission's rules, found in Title 47 of the Code of Federal Regulations.

III. BACKGROUND

3. The Bureau has received a claim that KXMK did not operate on January 23, 2015, which Licensee has vigorously disputed. The pleadings present legal and factual questions involving the Station's status under the Act. It is, however, undisputed that, except for brief periods of operation, KXMK has been silent since its license was granted. In order to resolve the matter in a manner that will enable KXMK to provide service to the public, Licensee and the Bureau have reached an agreement in which the Licensee agrees to voluntarily divest itself of KXMK by donating the station's license to a qualified nonprofit organization that wishes to operate the station. Such donation shall include other assets as described herein. In the event Licensee is not able to find such an organization to accept those

¹ 47 U.S.C. § 151 *et seq.*

donated assets, Licensee agrees that the KXMK license will be cancelled.

IV. AGREEMENT

4. The Parties acknowledge that any proceeding that might result from the Bureau's further processing of the claim, and Licensee's defense thereof, would be time-consuming and require further substantial expenditure of both public and private resources. In order to conserve such resources, resolve the matter, and enable prompt resumption of service to the public by the station, the Parties are entering into this Consent Decree, in consideration of the mutual commitments made herein.

5. Licensee will have a period of 180 days from the Effective Date to submit an application on FCC Form 314 for consent to assignment of the KXMK license to a nonprofit organization in which neither of the Owners, nor any person related to, employed by, or in partnership or any other joint business activity with either or both of the Owners (or any entity controlled by either or both of the Owners), is an officer, director, trustee, member, partner, employee, or paid consultant. Bureau will process such assignment application in the normal course and, upon determining that the proposed assignee is fully qualified, will grant an assignment of the license without conditions other than those customary for assignments. Licensee will endeavor to identify and contact Tribal Nations, Tribal entities, local groups or other non-profit entities to present the opportunity to accept a donation of the KXMK license, but there is no requirement that Licensees select any particular entity as a recipient or donate such license at all. If Licensee is unsuccessful in locating a proposed donee after 90 days from the Effective Date, the Bureau may directly contact and discuss the availability of the KXMK license with Tribal Nations, entities owned by Tribal Nations, and other non-profit entities, and such discussions shall include notification of the restrictions set forth herein. For Tribal entities and other entities, in circumstances where a change in transmitter site by KXMK would satisfy the Tribal Priority requirements set forth in Note 5 to 47 CFR § 73.3573 or other donations that would promote localism and diversity goals, the Bureau will entertain requests for waiver of its major change rule in that regulation to enable KXMK to provide vital communications services to Tribal lands or to other such local or diverse groups. Licensee agrees to donate the KXMK license as well as the related equipment listed on the Property Schedule to the nonprofit organization identified in the assignment of license application, and Licensee and Owners agree not to claim any charitable deductions on their federal or state tax returns (including any IRS Form 8283 or Montana Department of Revenue Form 2) based on such donations. KXMK's underlying allocation and license shall also be designated as NCE. The recipient nonprofit organization must agree not to assign the KXMK license to any of Licensees, the Owners, or any organization in which either or both of the Owners, or any person related to, employed by, or compensated in any way by either or both of the Owners (or any entity controlled by either or both of the Owners), is an officer, director, trustee, member, partner, employee, or paid consultant. The recipient nonprofit organization must also agree not to assign the KXMK license or transfer control of that license, with the exception of *pro forma* assignments and transfers, nor enter into a local sales/programming agreement with a commercial or non-tribal entity for a period of four (4) years after becoming the licensee. While seeking a donee for the KXMK license and then Bureau approval of the proposed assignment of the KXMK license, Licensee may keep KXMK silent. Alternatively, Licensee may enter into a time brokerage agreement to enable the proposed donee to return KXMK to operation pending consummation of the proposed assignment. In the event Licensee fails to submit a timely assignment of license application for KXMK, either because Licensee has not found a suitable donee willing to accept the license in the terms outlined above or for any other reasons, Licensee will submit the KXMK license to the Bureau for cancellation. If Licensee defaults on such obligation, the Bureau may cancel the KXMK license. Once Licensee has (i) filed an assignment application for KXMK to a recipient as set forth above and/or (ii) surrendered for cancellation the KXMK license, the obligations of the Licensee with regard to KXMK will have been satisfied. While Licensee's obligations under this Section 5 may have been satisfied, should the FCC, in its sole discretion, elect not immediately to cancel the KXMK license, then Licensee shall continue to cooperate with the FCC for an additional 120 days from such surrender, and will agree to seek consent to assignment of the

license of such station to a potential Tribal or other entity donee/assignee that steps forward following contacts from FCC staff. Any potential assignee under this Section 5 shall be solely responsible for (i) its own legal fees; (ii) engineering fees; and (iii) other technical expenses.

6. The Parties agree to be legally bound by the terms and conditions of this Consent Decree. Licensee and the Bureau each represent and warrant that its signatory is duly authorized to enter into this Consent Decree on its behalf. Licensee and Owners agree that the Bureau has jurisdiction over them and the matters contained in this Consent Decree.

7. The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement among Licensee and the Bureau concerning all contested or pending applications for KXMK.

8. In the event that any of the Licensee or Owners fails to satisfy any of its obligations under this Consent Decree, the Bureau may take any administrative adjudication or enforcement action available pursuant to the Communications Laws or other federal laws with respect to KXMK or the violation of this Consent Decree.

9. Licensee and Owners waive any and all rights they may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge the validity of this Consent Decree and the Order under the Communications Laws or other federal laws, provided the Order adopts the Consent Decree without change, addition or modification.

10. Licensee and Owners agree to waive any claims they may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 CFR § 1.1501 *et seq.*, relating to the matters discussed in this Consent Decree.

11. Licensee and Owners agree that if the Commission, or the United States on behalf of the Commission, brings a judicial action to enforce the terms of the Order adopting this Consent Decree, neither Licensee nor Owners will contest the validity of the Consent Decree or Order, and Licensee and Owners will waive any statutory right to an administrative hearing or a trial *de novo* with respect to any matter upon which the Order is based (provided that the Order is limited to adopting the Consent Decree without change, addition, or modification), and will consent to a judgment incorporating the terms of this Consent Decree.

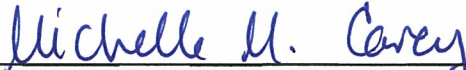
12. Licensee, Owners and the Bureau agree that the effectiveness of this Consent Decree is expressly contingent upon issuance of the Order, provided the Order adopts the Consent Decree without change, addition or modification.

13. Licensee, Owners and the Bureau agree that, in the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it will become null and void and may not be used in any manner in any legal proceeding.

14. Licensee and each of the Owners irrevocably waive personal service of any summons, complaint or other process and irrevocably consent to service of process by mail at P.O. Box 11060, Jackson Hole, WY 83002.

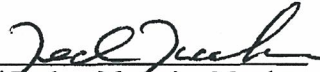
15. This Consent Decree may be signed in counterparts and/or by telecopy and, when so executed, the counterparts, taken together, will constitute a legally binding and enforceable instrument whether executed by telecopy or by original signatures.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey, ~~Acting~~ Chief, Media Bureau5/25/17

Date

COCHISE MEDIA LICENSES LLC



Ted Tucker, Managing Member

5-24-17

Date

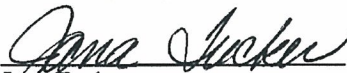
OWNERS:



Ted Tucker

5-24-17

Date



Jana Tucker

May 24, 2017

Date

PROPERTY SCHEDULE**OVERVIEW**

Cochise plans to include the station's critical transmission and other equipment owned by Cochise if the station was donated. This critical equipment would include the station's antenna and transmission line as well as a transmitter to make authorized power. These items represents the vast majority of expense for a station. Program origination equipment will vary greatly upon the donee's individual needs and, while not included, Cochise may provide additional equipment if the donee is a non- broadcaster such as a tribal entity, local high school or college or other local organization.

STATION EQUIPMENT TO BE DONATED

1. KXMK, Facility ID No. 183358, Oatman, Arizona
 - Shively Antenna
 - Andrew LDF7 Heliac 1300 Feet with DIN Connectors
 - BEXT 2000W FM Transmitter
 - Equipment Rack
 - Miscellaneous power and other cabling